SUPREME COURT ... 1968
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1214

DONALD SMELTZ BUTLER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

MARVIN M. KARPATKIN
660 Madison Avenue
New York, N. Y. 10021

MELVIN L. WULF
JOHN C. GRAY, JR.
156 Fifth Avenue
New York, N. Y. 10010

BERNARD A. BERKMAN
1320 The Superior Building
Cleveland, Ohio 44114

Attorneys for Amicus Curiae

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Interest of Amicus*

The American Civil Liberties Union is a non-profit, non-partisan membership corporation with 42 affiliates in thirty-eight states, and local chapters in most of such affiliates. Nationwide membership is approximately 115,000. Since its inception in 1920 amicus curiae has been committed to the securing and protection of the civil liberties and civil rights which are guaranteed by the United States Constitution. Amicus is not concerned with and takes no position on questions of foreign policy and military policy, or any

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* Written consents by the attorneys for both parties have been filed with the Clerk.

questions other than individual liberties and constitutional rights.

This case involves one of the most fundamental constitutional rights, the right not to be deprived of one's liberty without due process of law. This is a right which is guaranteed to all persons by the Fifth Amendment.

A fuller statement of the interest of amicus may be presented by setting forth policy positions taken by the Board of Directors of the American Civil Liberties Union at its annual plenary meeting on January 30, 1966. Following an introductory historical statement, amicus' Board of Directors adopted the following policy position on "Military Conscription":

> "In 1940, Congress adopted the first peacetime draft act in the history of the United States, making clear its belief that a grave crisis in world affairs warranted departure from democracy's traditional abhorrence of compulsory military service. Since then the nation has lived almost constantly with military conscription. The passage of twenty-five years would alone warrant reconsideration of the implications of conscription for individual liberty. The urgency of reconsideration is underscored by the danger that conscription, originally viewed as a temporary expedient occasioned by emergency, is becoming institutionalized. It is an accepted part of life; many citizens have grown to maturity almost without knowing a time when it did not exist.
>
> *Thus it is necessary once again to assert that compulsory military service, whether in time of war or peace, is always a severe deprivation of civil liberties. . . . [S]uch deprivation of liberty, through conscription,*

may only be warranted by the overriding need of national security, in time of war or the imminent danger of war.

To state this proposition does not dispense with the hard problem of determining when the point of 'overriding need' is reached. This is unquestionably a terribly difficult decision for the citizen to make, especially when the emotions surrounding the subject of 'national security' are stirred and modern warfare assumes so many different forms. The ordinary citizen is not a military or political expert, nor is he privy to all the information that government has at its command to help shape its policies. But these difficulties still do not relieve the free citizen of a free society of his responsibility for making choices. There is no escape from the need to evaluate whether personal liberty must in any given instance be sacrificed to the 'impulse of self-preservation,' unless we cease being a free society and forfeit the right and duty of the governed to judge whether conditions warrant the conscription *their* government proposes." [Emphasis added.]

Amicus has taken no position on the merits of the constitutional argument on the facts of this case. We do not argue that the draft was constitutional or unconstitutional on February 4, 1964, or on any other day. But we do maintain that since military service is always a severe deprivation of civil liberties, any individual, including petitioner here, should have the right to challenge its constitutionality. This essentially procedural right was denied by the trial court's action in refusing to hear evidence relevant to the

claim of unconstitutionality, and by the Court of Appeals in affirming such refusal. We urge that the courts below erred in this respect, and since this is the essential question raised in the petition for certiorari, amicus supports petitioner, and urges that a writ of certiorari be granted.

Statement of Facts Insofar as They Affect Amicus' Position

It was petitioner's position below that on the day he was ordered to report for induction, February 4, 1964, there was no such overriding need of manpower to satisfy the demands of national security as could not have been met by means less onerous than a compulsory draft. The petition suggests that the nation's military manpower needs could have been more than satisfied if reasonable steps were taken to encourage voluntary recruitment (pp. 6-11).

Petitioner sought to prove his case below through the introduction of data assembled by a Defense Department study of the draft, expert testimony, and other documentary evidence, including principally, statements made by members of Congress and testimony before a congressional committee by the Assistant Secretary of Defense in charge of manpower. The District Court refused to allow petitioner's counsel to introduce such documentary and expert testimony, and attempts to elicit such testimony via subpoena met with the same result.

The Court of Appeals affirmed, holding in essence, that since "the evidence proffered to prove unconstitutionality would not in its totality, and under a view most favorable to the defendant, prove unconstitutionality . . . " —— F. 2d at —— (Pet. 17a), the District Judge did not have the

power "to entertain the contest presented by appellant," —— F. 2d at —— (Pet. 23a).

Reason for Granting the Writ

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

Argument

Compulsory military service is such a severe deprivation of individual liberty that the constitutional guarantee of due process under the Fifth Amendment must permit a defendant who refuses to submit to induction to challenge the constitutional validity of the induction order on the grounds that at the time he refused to submit there was no such overriding need of national security in terms of manpower demands which could not be satisfied through less onerous means than a compulsory draft.

1. As stated in amicus' policy statement on military conscription, it must be asserted that "compulsory military service, whether in time of war or peace, is *always* a severe deprivation of civil liberties." This is a proposition which is hardly debatable. Conscription restricts individual liberty of movement, residence, and travel. See *Edwards* v. *California,* 314 U. S. 160 (1941); *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964). It is a restriction on the right to engage in one's occupation. See *Truax* v. *Raich,* 239 U. S. 33 (1915); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923). It likewise restricts freedom of speech and association, see

Shelton v. *Tucker,* 364 U. S. 479 (1960), inasmuch as persons in the military obviously do not have the same degree of freedom of expression and association as persons in civilian life, *Cafeteria Workers* v. *McElroy,* 367 U. S. 886 (1961); *United States* v. *Howe,* 17 U. S. C. M. A. 165, 37 C. M. R. 429 (1967). Furthermore, it subjects the individual to military law, as well as military commands, and thereby imposes a more restricted standard of behavior than that available to persons in civilian life. See Uniform Code of Military Justice, *passim,* 10 U. S. C. §§801 *et seq.*

In addition, it makes the individual, regardless of his wishes, an instrument of the foreign and military policy of a government which he may disagree with, either generally or specifically. Yet he has no choice but to obey his military orders requiring him to be such an instrument.[1]

No citations are needed to emphasize the most egregious deprivations effected by a military draft: severe bodily injury, maiming for life, and in many cases death. Perhaps the only thing which might be more severe than deprivation of life, is requiring an individual to become a killer of others. This is the ultimate deprivation of liberty imposed by a military draft.[2]

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[1] "By handing boys over to the arbitrary and complete domination of the Government, we put it in the power of the Government to indoctrinate them with political doctrines then popular with the Government. In wartime it is bad enough; in peacetime it would be intolerable." Senator Robert A. Taft, quoted in statement by Rep. Lindsay, 110 Cong. Record 8575-6 (April 21, 1964).

[2] The draftee's loss of liberty is accompanied by a severe loss of property. In peacetime, it is a substantial question whether the state may raise armies by a system of in kind taxation on the services of young men which admittedly falls on only a percentage of even those fit for military service [see, e.g., Report of the National Ad-

2. The due process clause of the Fifth Amendment protects "certain fundamental personal liberties from abridgment by the federal government", *Griswold* v. *Connecticut*, 381 U. S. 479, 492 (1965) (concurring opinion by Mr. Justice Goldberg). If these personal liberties protected by the Fifth Amendment include freedom of travel, *Aptheker* v. *Secretary of State, supra;* right of privacy, *Griswold* v. *Connecticut, supra;* right to employment, *Truax* v. *Raich, supra;* right to attend private religious school in lieu of public school, *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925); and right to instruction in a foreign language, *Meyer* v. *Nebraska,* 262 U. S. 390, 399-400 (1923); then *a fortiori,* the Due Process Clause must include the protection of a fundamental personal liberty which is infinitely more dear, the liberty to be free from compulsory military service, and ultimately to be free of the risk of death and the compulsion to kill others.

3. This Court has held this term that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of Congressional power which can be brought within its ambit." *United States* v. *Robel,* 389 U. S. 258, 263 (1967). It has previously held that the Due Process Clause is a limitation on all governmental power, "even the war power" *Galvan* v. *Press,* 347 U. S. 522, 530 (1954).[3] Neither Congress, nor any executive authority,

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visory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?,* pp. 17-29, 57-59 (1967)] rather than by financial taxation of the nation as a whole to pay the actual economic value of the services of our military men.

[3] The Court below observed that the statement by this Court of constitutional limitations on the war power in *Galvan* v. *Press, supra,* was dictum, and that in another case, *Hamilton* v. *Kentucky Distilleries & Warehouse Commission,* 251 U. S. 146 (1919), notwithstanding a similar statement of constitutional limitation, this

can simply invoke the war power, and claim that it has thereby freed itself from due process and other constitutional limitations. See *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579 (1952); *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144 (1963); *Wolff* v. *Selective Service Local Board No. 16,* 372 F. 2d 817 (2nd Cir. 1967). The Constitution and all of its limitations, apply "equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan,* 71 U. S. 2, 120 (1866). See also *Ex parte Endo,* 323 U. S. 283 (1944); *Reid* v. *Covert,* 354 U. S. 1 (1957); *Harmon* v. *Brucker,* 355 U. S. 579 (1958). As Mr. Justice Jackson observed, concurring in *Woods* v. *Miller,* 333 U. S. 138, 146-147 (1948), whenever the war power is invoked "the constitutional basis should be scrutinized with care." [4]

Court "found no fault in the Congressional action there involved." —— F. 2d —— (Pet. 24a). That this Court has not hesitated to *enforce* constitutional limits on the war power is clear from a large number of decisions. See, e.g., *United States* v. *Robel,* 389 U. S. 258, 263-264 (1967); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 587 (1952); *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 88 (1921) (". . . the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guarantees and limitations of the Fifth and Sixth Amendments"). In the *Hamilton* case, this Court held that the World War I emergency which justified the legislation was not yet over, and added "But the exercise of the war powers . . . is subject to the Fifth Amendment." 251 U. S. at 155. Cf. *Illawara District County Council* v. *Wickham,* 101 Commw. L. R. 467 (Austl. 1959), a decision of Australia's highest court, described by Chief Justice Warren as "invalidating a far reaching veteran's preference statute on the grounds that with the World War II emergency past, the war power justification for such laws, under the Australian Constitution, had ceased." Warren, "The Bill of Rights and the Military," in Cahn (ed.), *The Great Rights* 110, n. 50 (1963).

[4] The founding fathers were well aware that control of the federal government's power to turn citizens into soldiers involved serious

Citing the *Selective Draft Law Cases*, 245 U. S. 366 (1918), which upheld the constitutionality of the World War I draft, the Court below implies that the constitutionality of conscription is so self-evident that under no set of facts would the District Court have had power to entertain a test of constitutionality. —— F. 2d at —— (Pet. 24a, 23a). But even in the case of the World War I conscription legislation, enacted by Congress "as the result of a war declared by the great representative body of the people", 245 U. S. at 390, this Court spoke of "the reciprocal obligation of the citizen to render military service *in case of need* . . ." 245 U. S. at 378. (Emphasis added.)

In *United States* v. *Macintosh*, 283 U. S. 605 (1931), this Court upheld, by a vote of 5-4, the constitutionality of a statute which compelled an oath to bear arms as a condition of naturalization. Invoking the war power, this Court qualified its decision by noting that such invocation was proper "when necessity calls for its exercise", and that there might nonetheless be "qualifications or limitations . . . found in the Constitution." 283 U. S. at 622.[5] It follows that there

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questions of individual liberty. The Constitution provides a complex system of divided authority for the regulation of the militia, the compulsory "citizens' army" of the eighteenth century. Art. I, Sect. 8, Cls. 15, 16. See generally Wiener, *The Military Clause of the Constitution*, 54 Harv. L. Rev. 181 (1941). While the specific requirements of the militia clauses may have only indirect relevance to the problems of modern military organization, they do illustrate the need for some limitation on governmental power in this critical area. The Due Process Clause is the flexible instrument which can provide protection for the individual from unnecessarily coercive governmental power while respecting legitimate state interests.

[5] The *Macintosh* majority listed among the war powers: restrictions on freedom of speech and press and trial by jury; confiscation of property without compensation; fixing of prices; taking over of railroads; ". . . and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war." 283 U. S. at 622.

must be some manner of testing whether "necessity calls for its exercise", some mode whereby a determination can be made if there are any constitutional "qualifications or limitations." Certiorari should be granted, amicus urges, so that this Court can rule as to where, how and when these vital determinations should be made.

4. Amicus submits that many of the authorities set forth in the petition plainly establish the appropriateness of presenting factual evidence of unconstitutionality. Mr. Justice Holmes observed in *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, 548 (1924), that factual allegations tending to prove unconstitutionality " . . . cannot be declared offhand to be unmaintainable." Amicus respectfully suggests that the trial court disregarded Mr. Justice Holmes' apt observation in that it "declared offhand" that defendant's allegations were not merely unpersuasive, but were "unmaintainable."

When a legislature takes action based on a declared state of emergency, this does not render its action beyond challenge. See cases cited in paragraph 3, *supra*. The most that can be said for the legislative declaration is that it is "a rebuttable presumption" that the declared emergency exists.[6] See *Whitney* v. *California*, 274 U. S. 357, 378-379 (1927) (concurring opinion by Mr. Justice Brandeis). If it is a rebuttable presumption, there must, *ipso facto*, be an opportunity to rebut it. Amicus submits that the courts below refused to allow any such opportunity. They held in

[6] "Exigencies of the kind do arise in time of war or impending national emergency, but it is the emergency . . . that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified." *United States* v. *Russell*, 80 U. S. 623, 628 (1871).

effect that it was not a rebuttable presumption, but a conclusive presumption.

In a recent case in which the government attempted to justify a statute as an exercise of the war power, this Court said,

> "When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated. See *Schneider* v. *New Jersey*, 308 U. S. 147." *United States* v. *Robel*, 389 U. S. 258, 264 (1967).

That the "task" in this case of court review of the reasonableness of Congressional action will be both "delicate and difficult" cannot justify the lower courts' abdication of their judicial role. It is the willingness of the courts to consider the legally and politically difficult issues which is the bulwark of the principle of limited government. In the words of Mr. Justice Jackson, "'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943).

The Chief Justice has written:

> ". . . if judicial review is to constitute a meaningful restraint upon unwarranted encroachments upon freedom in the name of military necessity, situations in which the judiciary refrains from examining the merit

of the claim of necessity must be kept to an absolute minimum." Warren, "The Bill of Rights and the Military," in Cahn (ed.), *The Great Rights* 102 (1963).

In this case, thus far, the judiciary has indeed refrained "from examining the claim of necessity." Amicus urges that in the light of the enormous public importance of the underlying question, this Court should grant certiorari and thereby allow such examination to take place.

It need only be added, that in amicus' view, all of the modes of testimony which petitioner sought to offer to the trial court in support of the claim of unconstitutionality were competent. See Note, *Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to the Courts,* 61 Harv. L. Rev. 692 (1948); Note, *The Presentation of Facts Underlying Constitutionality of Statutes,* 49 Harv. L. Rev. 631 (1936). Especially when there are constitutional questions at stake, courts should not close their eyes to the relevant statements of "individual legislators, either in legislative chambers or through the press." *Gomillion* v. *Lightfoot,* 270 F. 2d 594, 610 (5th Cir. 1959) (dissenting opinion by Circuit Judge Brown), reversed 364 U. S. 339 (1960).

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

March, 1968

Respectfully submitted,

MARVIN M. KARPATKIN
660 Madison Avenue
New York, N. Y. 10021

MELVIN L. WULF
JOHN C. GRAY, JR.
156 Fifth Avenue
New York, N. Y. 10010

BERNARD A. BERKMAN
1320 The Superior Building
Cleveland, Ohio 44114

Attorneys for Amicus Curiae